IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 24, 2006 Session

STATE OF TENNESSEE v. QUINN L. HAMILTON

Appeal from the Criminal Court for Davidson County
No. 97-C-2004 Cheryl Blackburn, Judge

No. M2005-02748-CCA-R3-CD - Filed March 29, 2007

The petitioner, Quinn L. Hamilton,[1] was convicted of possession with intent to sell or deliver .5 grams or more of cocaine and received a sentence of fifteen years. Subsequently, he was granted a delayed appeal by the post-conviction court. In this delayed appeal, the petitioner argues: (1) that the post-conviction court properly granted the delayed appeal; and (2) that his original motion to suppress evidence should have been granted because he was subjected to an unlawful seizure by law enforcement. Following careful review of the record and the parties' briefs, we reverse the denial of the petitioner's motion to suppress and vacate his conviction and sentence.

Tenn. R. App. P. 3 Appeal; Judgment of the Criminal Court Reversed and Vacated

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA McGEE OGLE, JJ., joined.

John Rodgers Jr., and James P. McNamara, Nashville, Tennessee, for the appellant, Quinn L. Hamilton.

Michael E. Moore, Acting Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Thomas Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND & PROCEDURAL HISTORY

The following is a summary of the procedural events which have culminated in this delayed appeal. In 1997, a Davidson County Grand Jury returned an indictment against the petitioner, charging him with multiple offenses including aggravated robbery, evading arrest, and possession

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[1] We have determined to use the name Quinn L. Hamilton as set forth in the indictment.

with intent to sell or deliver .5 grams or more of cocaine. Around this time, trial counsel was appointed. The petitioner's drug charge was severed from the other charges for trial, whereupon, the petitioner was convicted of aggravated robbery and evading arrest. For these convictions, the petitioner received an aggregate sentence of twenty-six years to be served in the Department of Correction. The petitioner's convictions and sentences were affirmed on appeal. *State v. Quinn L. Hamilton*, No. M2001-02748-CCA-R3-CD, 2002 WL 31730877 (Tenn. Crim. App., at Nashville, Dec. 5, 2002), *perm. app. denied* (Tenn. Mar. 10, 2003). Following an unsuccessful motion to suppress evidence, the petitioner had a second trial and was convicted on the charge of possession with intent to sell or deliver .5 grams or more of cocaine. Thereafter, on May 24, 2002, he was sentenced to fifteen years to be served in the Department of Correction. Although the petitioner, through counsel, filed a motion for a new trial on July 1, 2002, no appeal was filed.

From the record, it appears that on June 13, 2002, counsel sent a letter to the petitioner informing him that all transcripts "from the first trial" were enclosed. In the same letter, counsel also stated that he was including, *inter alia*, a copy of the motion for new trial filed in regard to the petitioner's second trial and the "Brief of Petitioner filed in the Court of Criminal Appeals."[2] Subsequently, another letter, dated August 27, 2003, was sent by counsel to the petitioner. In the letter, counsel confirmed receipt of the petitioner's letter, dated August 22, 2003, and informed the petitioner that he received all documentation regarding his cases and that "[once] you file your collateral review, a new attorney will be appointed for you who can gain access to those records on your behalf."

On November 24, 2004, the petitioner, through a new attorney, filed a petition for post-conviction relief. In the petition, the petitioner submitted that he was denied the right to appeal his drug conviction due to the ineffective assistance of counsel and requested a delayed appeal. The petitioner also asserted he was misled by counsel to believe that his appeal was being perfected. In December 2004, the trial court granted the petitioner an evidentiary hearing to consider the claims presented in the post-conviction petition and the reasons for the delay in seeking relief.

At the hearing, the petitioner's trial counsel admitted that he failed to file a notice of appeal due to an inadvertent error on his part. Counsel also admitted that he did not discuss waiving the appeal with the petitioner. The petitioner testified that he contacted counsel in a letter asking counsel to check on his appeal. The petitioner asserted "I wrote him then, and he told me he was preparing the transcript, that I had to wait after the robbery. So I'm trying to get the transcript so I can appeal the drug charge." The petitioner further asserted that the first time he found out his appeal was not filed was in 2004.

[2] It is unclear from the 2002 letter if counsel was referring to the first trial or the second trial when mentioning the appellate brief.

Following the hearing, the post-conviction court found that counsel was ineffective in failing to file a notice of appeal and granted the petitioner's request for a delayed appeal.[3] Subsequently, the petitioner was allowed to file an amended motion for new trial. After a hearing on the amended motion for new trial, the post-conviction court denied the motion. This delayed appeal followed.

ANALYSIS

I. Delayed Appeal

In its appellate brief, the state challenges for the first time the trial court's grant of a delayed appeal.[4] Specifically, the state argues that the petitioner's post-conviction petition requesting a delayed appeal was barred by the one-year statute of limitations. In rebuttal, the petitioner argues that the state waived "any issues with respect to the timing of the post-conviction petition by not filing a notice of appeal in the [post-conviction] court." In the alternative, the petitioner argues that the court properly granted the delayed appeal because his counsel never filed a notice of appeal and the petitioner was not informed of the error until after the one-year statute of limitations.

First, we address the state's argument that the request for delayed appeal should have been dismissed by the post-conviction court as barred by the one-year statute of limitations. As a preliminary matter, we note that the state did not raise the statute of limitations as an affirmative defense in the post-conviction court; but instead, raises it for the first time in this court. Generally, an appellate court will not allow a party to raise an issue for the first time on appeal because such action denies the adversary opportunity to rebut the issue with evidence and argument. *See Walsh v. State*, 166 S.W.3d 641, 645 (Tenn. 2005) ("Issues not addressed in the post-conviction court will generally not be addressed on appeal."); *State v. Adkisson*, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994) ("[A] party will not be permitted to assert an issue for the first time in the appellate court."); s*ee also* Tenn. Code Ann. § 40-30-110(f) ("There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived.").

Nonetheless, the statute of limitations for the filing of a post-conviction petition is not an affirmative defense which must be asserted by the state. *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001). Pursuant to the Post-Conviction Procedure Act, a petition for post-conviction relief must be filed within one year of the final action of the highest state appellate court to which an appeal is taken, or, if no appeal is taken, within one year of the date on which the judgment became final, or

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[3] In granting the delayed appeal, the post-conviction court relied on the following authorities: Tenn. Code Ann. §§ 40-30-111 & 113; *Wallace v. State*, 121 S.W.3d 652 (Tenn. 2003); and *State v. Billy Joe Coffelt*, No. M1998-00337-CCA-R3-CD, 2001 WL 120576 (Tenn. Crim. App., at Nashville, Feb. 1, 2001).

[4] Confusingly, this challenge to the petitioner's delayed appeal is included in the state's initial appellate brief but not in its later-filed brief. This begs the question of whether this is an oversight or a deliberate concession by the state.

consideration of the petition is barred. Tenn. Code Ann. § 40-30-102(a). The Act clearly provides the following:

> The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise. . . .

Id. The Post-Conviction Procedure Act also provides the authority to grant a delayed appeal. *See id*. §§ 40-30-111, -113.[5] However, compliance with the statute of limitations is a prerequisite to obtaining post-conviction relief in the form of a delayed appeal. *See Handley v. State*, 889 S.W.2d 223, 224 (Tenn. Crim. App. 1994). Under the circumstances of this case, the trial court denied the petitioner's motion for new trial on July 1, 2002 and the petitioner's judgment became final thirty days later. *See* Tenn. R. App. P. 4(c); *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). Thus, the petitioner's post-conviction petition, which was filed on November 24, 2004, was untimely and barred by the one-year statute of limitations.

However, notwithstanding the one-year statute of limitations, a post-conviction court may still consider an untimely petition if (1) a new constitutional right has been recognized; (2) the petitioner's innocence has been established by new scientific evidence; or (3) a previous conviction that enhanced the petitioner's sentence has been held to be invalid. Tenn. Code Ann. §

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[5] Tennessee Code Annotated section 40-30-111 states in pertinent part:

> (a) If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, including a finding that trial counsel was ineffective on direct appeal, the court shall vacate and set aside the judgment or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper. . . .

Tennessee Code Annotated section 40-30-113 states in pertinent part:

> (a) When the trial judge conducting a hearing pursuant to this part finds that the petitioner was denied the right to an appeal from the original conviction in violation of the Constitution of the United States or the Constitution of Tennessee and that there is an adequate record of the original trial proceeding available for a review, the judge can:
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> (1) If a transcript was filed, grant a delayed appeal;

"[T]hese statutes clearly indicate that a defendant may receive a delayed appeal where there has been a denial of the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution." *Wallace*, 121 S.W.3d at 656.

40-30-102(b). A court may also consider an untimely petition if applying the statute of limitations would deny the petitioner due process. *Burford v. State*, 845 S.W.2d 204, 209-10 (Tenn. 1992).

Upon review of the facts of this case, we determine that the post-conviction court properly considered the post-conviction petition and granted the delayed appeal because due process considerations required the tolling of the statute of limitations. The record reflects that the trial court granted a delayed appeal after finding the petitioner's counsel was ineffective in failing to file a notice of appeal. Notably, there is no constitutional right to appeal; yet where appellate review is provided by statute, the proceedings must comport with constitutional standards. *See Evitts v. Lucey*, 469 U.S. 387 (1985) (holding constitutional right to counsel encompasses the right to effective assistance of counsel); *Douglas v. California*, 372 U.S. 353 (1963) (holding that Fourteenth Amendment guarantees the right to counsel through the first appeal); *Collins v. State*, 670 S.W.2d 219 (Tenn. 1984) (noting that criminal defendant has a right to one level of appellate review); *State v. Gillespie*, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994). *See also* Tenn. Code Ann. § 40-14-203; Tenn. R. App. P. 3(b). Although appeal may be waived, a defendant must knowingly and voluntarily waive it. *See* Tenn. R. Crim P. 37(d);[6] *Michael S. Hurt v. State*, No. 01C01-9207-CC-00213, 1993 WL 39751 (Tenn. Crim. App., at Nashville, Feb. 18, 1993) (granting a delayed appeal where there was no written waiver of appeal, and no substantive evidence that appeal was knowingly and voluntarily waived).

In previous decisions, our supreme court has recognized that in certain circumstances the strict application of the statute of limitations in a post-conviction proceeding would violate constitutional due process. *See, e.g.*, *Williams v. State*, 44 S.W.3d 464 (Tenn. 2001); *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000); *Burford*, 845 S.W.2d 204. Our supreme court has recognized the state's interest in preventing the litigation of stale claims by enacting statutes of limitations in post-conviction cases. *Burford*, 845 S.W.2d at 208. However, our supreme court has also recognized that due process requires a person be provided with an opportunity to have his claim heard and determined at a meaningful time and in a meaningful manner. *Id.* As such, a "court must determine whether application of the limitations period would deny the petitioner a reasonable opportunity to present the claim by balancing the liberty interest in collaterally attacking constitutional violations occurring during the conviction process, . . . against the State's interest in preventing the litigation of stale and fraudulent claims." *Sample v. State*, 82 S.W.3d 267, 272 (Tenn. 2002) (internal quotations omitted).

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[6] Rule 37(d)(2) provides the following:

> If an indigent or nonindigent defendant who has the right to appeal a conviction chooses to waive the appeal, counsel for the defendant shall file with the clerk, during the time within which the notice of appeal could have been filed, a written waiver of appeal, which must:
> (A) clearly reflect that the defendant is aware of the right to appeal and voluntarily waives it; and
> (B) be signed by the defendant and the defendant's counsel of record.

Turning to the petitioner's liberty interest, the record reflects that the petitioner was procedurally barred from pursuing issues on direct appeal as a result of counsel's ineffective assistance. Our supreme court has noted that "[c]ounsel's abandonment of his client at such a critical stage of the proceedings resulted in the failure to preserve and pursue the available post-trial remedies and the complete failure to subject the [s]tate to the adversarial appellate process." *Wallace*, 121 S.W.3d at 658. In addition, the United States Supreme Court has held that "[a] first appeal as of right . . . is not adjudicated in accord with *due process of law* if the appellant does not have the effective assistance of an attorney." *Evitts*, 469 U.S. 396 (emphasis added). In contrast, the state interest is merely one of administrative efficiency and economy. *See Burford*, 845 S.W.2d at 209. Thus, it follows that the petitioner's liberty interest in having a first-tier appeal outweighs the state's interest in avoiding the litigation of a stale or fraudulent claim. To reiterate, due process requires that a person be provided an opportunity to present claims at a meaningful time and in a meaningful manner. *Id*. at 208. In our view, a summary dismissal of the petitioner's delayed appeal without review would be an "abridgement of both direct and post-conviction avenues of appeal." *Williams*, 44 S.W.3d at 471. Because the petitioner was denied the opportunity of first- tier review through no fault of his own, we conclude that due process considerations require the statute of limitations be tolled. Accordingly, the petitioner's delayed appeal is properly before this court.

II. Motion to Suppress

We now address the merits of the issue raised in the petitioner's delayed appeal. On appeal, the petitioner challenges the trial court's denial of his motion to suppress. Specifically, the petitioner argues that he was unlawfully seized when armed, uniformed police officers approached him and initiated what was described as an "investigative detention" without any reasonable basis to justify it. The state argues that the petitioner was not unlawfully seized because the seizure resulted from a consensual police-citizen encounter which evolved into a reasonable basis for an investigatory detention after the petitioner "aggressively" shoved his hand into his pocket.

From the record of the suppression hearing, we glean the following facts. Damian Huggins testified that he was a police officer with the Vice Narcotics Division of the Nashville Police Department. On August 29, 1996, he was on patrol with a new police recruit in a neighborhood on Petway Avenue, an area known for drug activity, when he saw the petitioner, Quinn Hamilton, standing in the street near a car window engaging in what appeared to be a drug transaction. Based upon this observation, Officer Huggins approached the petitioner and told him to stop. In response, the petitioner fled. Following a foot pursuit, the petitioner was apprehended and arrested on an outstanding warrant. He was arrested in the yard area near a residence located on 908 Petway Avenue. At the time of his arrest, the petitioner denied he sold drugs, and said he ran because he thought he "had a warrant." After a search of his person, the petitioner was found to be in possession of the "cigar part" of a "marijuana blunt."

Officer Huggins testified that he was later subpoenaed to court based upon the August 29th arrest, whereupon, he was told by the affiant of the arrest warrant that the individual in court was not Quinn Hamilton. Not positive of Quinn Hamilton's identity, Officer Huggins spoke to the individual

in court and asked him if he was the person arrested on August 29th. The individual responded, "that wasn't me." Therefore, Officer Huggins told the court that he could not be sure the individual in court was the Quinn Hamilton whom he arrested on August 29th without checking fingerprints and pictures. As a result, the court ordered a continuance to allow Officer Huggins time to investigate the identity of Quinn Hamilton.[7] Subsequently, Officer Huggins went to the identification section of the police department and checked Quinn Hamilton's fingerprints and booking photographs taken after the August 29th arrest. Based upon this information, Officer Huggins was able to verify the identity of the individual as "Quinn Hamilton," the individual arrested on August 29th. However, Officer Huggins "wanted to be positive" before testifying in court so he returned to the location of the August 29th arrest with other police officers on October 15, 1996, around 4:45 p.m.

According to Officer Huggins, he requested that other police officers accompany him because the area was a "high drug area" and he "figured we would probably run into . . . the same subject that we had run [into] before." Officer Huggins decided he would go up Petway and requested another officer to go around the alley. As Officer Huggins pulled up to 908 Petway Avenue, he noticed the petitioner standing in the driveway.[8] The petitioner appeared to be "the individual [who] was in court that day," and the individual whom he arrested earlier. Officer Huggins got out of his patrol car, approached the petitioner, and called him by name. In response, the petitioner turned around, saw Officer Huggins, looked the other way toward the other officers, and "immediately jammed his hand into his pocket."

Officer Huggins testified that he asked the petitioner if he was Quinn Hamilton and the petitioner responded with "yeah, man, you know who I am." At this time, Officer Huggins noticed that the petitioner had his hand "stuffed deep in his pocket," and he was "jittery, nervous, looking away." Officer Huggins then told the petitioner to remove his hand from his pocket. Officer Huggins stated that he thought the petitioner's body language was aggressive and furtive; therefore, he wanted to make sure the petitioner was not carrying a weapon. Officer Huggins recalled that for his own safety, he asked the petitioner to remove his hand from the pocket several times, but the petitioner did not respond and became more nervous. At this time, Officer Huggins grabbed the petitioner's pocket, then "grabbed his hand inside his pocket." The petitioner started to struggle. During the struggle, the petitioner's hand came out of his pocket revealing a plastic bag containing 11.2 grams of cocaine.

Officer Huggins testified that he approached the petitioner on October 15th in order to "get a valid identification" of the petitioner as the individual arrested on August 29th. Officer Huggins stated that when he first approached the petitioner he had no intention of arresting him because the petitioner "hadn't done anything wrong to [his] knowledge at that time." Officer Huggins testified

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[7] It is unclear from the transcript of the suppression hearing the length of time given for the continuance and the exact date of the petitioner's initial appearance in court.

[8] The record reflects that the residence on 908 Petway Avenue most likely belonged to the petitioner's grandmother though it is not clear if the petitioner resided there.

that he and petitioner struggled for about a minute and described the struggle as a "fleeting-type aggression" where the petitioner wanted to get away.

On cross-examination, Officer Huggins admitted that he had no search or arrest warrant when he approached the petitioner on October 15th. Officer Huggins stated that to his knowledge the case stemming from the August 29th arrest was continued to obtain positive identification of Quinn Hamilton. Officer Huggins acknowledged he had reviewed booking photographs and fingerprints of the individual arrested on August 29th and based on this investigation "he had every reason to believe that it was Quinn Hamilton." Officer Huggins also acknowledged that he did not observe the petitioner engaged in criminal activity on October 15th. Officer Huggins further acknowledged that the petitioner was not armed when he was arrested on August 29th and he observed no weapon on the petitioner's person on October 15th. Officer Huggins reiterated that at the time he approached the petitioner on October 15th, he was going to place him under "investigative detention" in order to "find out who he was." Officer Huggins admitted that he had several police officers with him when he went out to the neighborhood on Petway Avenue. As Officer Huggins explained, "[w]e always bring them to the other area for sweeps . . . and, yes, in case, [the petitioner] ran, of course, I figured he was going to run again. I think he is selling drugs over there. That is why I chased him the first time, so, yeah, if he ran, I wanted to stop him." Officer Huggins stated that illegal activity was "prevalent in that area at that time. If [the petitioner] sold dope there in the weeks before, I don't see why he would stop, since he was out of jail, and I've seen him there regular. Now I knew I had a name and I had to put a person with it."

On re-direct examination, Officer Huggins testified that it was common for drug dealers to carry weapons. Officer Huggins stated that had the petitioner answered his questions without arousing suspicion by sticking his hand in his pocket and becoming furtive in his movements, he would not have "even patted [the petitioner] down."

At the conclusion of the hearing, the trial court delivered its findings of fact and conclusions of law from the bench, accrediting the testimony of Officer Huggins and finding the facts to be in accordance therewith. The court found that Officer Huggins was out in the Petway area investigating the petitioner because the petitioner had earlier denied that he was the person arrested in August, "so Officer Huggins ha[d] every right in the world to approach him to inquire further." The court then stated the following:

> At that time, the [petitioner] shoves his hands in his pockets, refuses to take them out. The officer has a right to frisk him, and in addition to that, at that point, he could easily be arrested for resisting a stop, frisk, halt, or arrest, and it is at that point that [the petitioner] then throws the substance.
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> I'm going to find that this entire situation is lawful. . . .

The court then denied the petitioner's motion to suppress.

When a decision on a motion to suppress is challenged, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). However, appellate review of a trial court's conclusions of law and application of law to facts on a motion to suppress evidence is a de novo review. *See State v. Nicholson*, 188 S.W.3d 649, 656 (Tenn. 2006); *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001).

Both the state and federal constitutions expressly protect individuals from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. These constitutional provisions are designed "to prevent arbitrary and oppressive interference with the privacy and personal security of individuals." *Daniel*, 12 S.W.3d at 424 (quoting *INS v. Delgado*, 466 U.S. 210, 216 (1984)). It is the duty of courts to be mindful of the constitutional protections afforded to the individual citizen and guard against any stealthy encroachments thereon. *Williams v. State*, 506 S.W.2d 193, 199 (Tenn. Crim. App. 1973). As such, "a warrantless seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Nicholson*, 188 S.W.3d at 656; *see also State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000).

Relative to the degree of restraint upon a citizen's liberty, police-citizen interactions have been categorized as follows: (1) a full scale arrest, which must be supported by probable cause; (2) a brief investigatory stop or detention, which must be supported by reasonable suspicion supported by specific and articulable facts; and (3) a brief police-citizen encounter, which is deemed consensual and requires no objective justification. *See Daniel*, 12 S.W.3d at 424; s*ee also Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968). "While arrests and investigatory stops are seizures implicating constitutional protections, consensual encounters are not." *Nicholson*, 188 S.W.3d at 656.

"[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Bostick*, 501 U.S. at 434. As the United States Supreme Court explained:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable,

> objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Florida v. Royer, 460 U.S. 491, 497-98 (1983) (citations omitted). Instead, a seizure occurs when a police officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty. *Daniel*, 12 S.W.3d at 424; *see also Terry*, 392 U.S. 1, 19 n.16. The dispositive question is whether the circumstances show that the police conduct at issue would have caused a reasonable person to believe that he or she was not free to leave or otherwise terminate the encounter. *Daniel*, 12 S.W.3d at 425. In making this determination, our constitution requires the application of the totality-of-the circumstances approach, with no single factor dictating the ultimate conclusion as to whether a seizure has occurred. *See State v. Randolph*, 74 S.W.3d 330, 336-37 (Tenn. 2002). This flexible analysis "is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Daniel*, 12 S.W.3d. at 426; *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

Although non-exhaustive, the following factors are useful in determining whether a seizure has occurred: "the time, place and purpose of the encounter; the words used by the officer; the officer's tone of voice and general demeanor; the officer's statements to others who were present during the encounter; the threatening presence of several officers; the display of a weapon by an officer; and the physical touching of the person of the citizen." *Daniel*, 12 S.W.3d at 426. Notably, our supreme court has indicated that a police-citizen encounter typically becomes a seizure if a police officer:

> (1) pursues an individual who has attempted to terminate the contact by departing; (2) continues to interrogate a person who has clearly expressed a desire not to cooperate; (3) renews interrogation of a person who has earlier responded fully to police inquiries; (4) verbally orders a citizen to stop and answer questions; (5) retains a citizen's identification or other property; (6) physically restrains a citizen or blocks the citizen's path; (7) displays a weapon during the encounter.

Id. at 426. Also, our supreme court recognized that a seizure occurred when a police officer made a show of authority by activating the blue lights on his patrol car and instructing a citizen to stop. *Randolph*, 74 S.W.3d at 338. Importantly, it is the reasonableness of the police-citizen encounter which must be measured.

In our view, the controlling issue is whether the police had a constitutionally valid basis for intruding into the petitioner's privacy. While it is true that police may approach a citizen and freely question the citizen without any basis or belief that the citizen is involved in criminal activity, the police-citizen encounter in this case cannot be fairly characterized as a consensual encounter involving no restraint on the petitioner's liberty. First, the encounter between Officer Huggins and the petitioner was not a police-citizen encounter initiated after a routine patrol or random drug sweep. It was a deliberate search of the petitioner specifically initiated by the police without a warrant. On October 15th, Officer Huggins, along with other armed, uniformed officers, went to the

same location on Petway Avenue where the petitioner had been previously arrested for the specific purpose of conducting an "investigative detention" of the petitioner. Officer Huggins decided to find the petitioner despite the fact that his identity was previously verified from the fingerprints and booking photographs taken on August 29th.

In addition, the encounter was sufficiently intimidating to a cause a reasonable person to believe that he or she was not free leave. Here, Officer Huggins requested other police officers accompany him in order to stop the petitioner in case he fled. Then, despite the fact that Officer Huggins obviously recognized the petitioner, he and at least one other officer quickly approached the petitioner from different angles while he stood in the driveway.[9] At this time, Officer Huggins asked the petitioner if he was Quinn Hamilton and the petitioner responded affirmatively. Officer Huggins then ordered the petitioner to take his hands out of his pockets. When the petitioner did not comply, Officer Huggins physically grabbed the petitioner's hand. All these actions were taken despite there being no reasonable suspicion that the petitioner was engaged in criminal activity. Therefore, in our view, the police officers' approach and order to the petitioner to remove his hands from his pockets constituted a show of authority that restrained the petitioner's liberty. Accordingly, we conclude that the petitioner was seized after he was approached by law enforcement officers and ordered to take his hands out of his pockets.

Having found a seizure, we now must determine whether sufficient justification existed to warrant the seizure. Here, the state argues that the petitioner's actions in shoving his hand into his pocket provided a reasonable suspicion that the petitioner was armed and dangerous. We disagree. In our view, the state's argument ignores the limited scope of a weapons search set forth in *Terry v. Ohio*.

Under the familiar *Terry* doctrine, a consensual police-citizen encounter may evolve into an investigatory detention if the police officer has a reasonable suspicion supported by articulable facts that the person stopped is, or is about to be, engaged in criminal activity. *See Terry*, 392 U.S. at 30; *see also United States v. Sokolow*, 490 U.S. 1, 7 (1989). Such reasonable suspicion is something more than an "inchoate and unparticularized suspicion or hunch." *Terry*, 392 U.S. at 27. Significantly, the *Terry* doctrine indicates that a police officer may conduct a limited protective search for weapons – *but only* where the officer has already initiated a *lawful investigatory stop* of the individual and is justified in believing that the individual is armed and dangerous. *See id*. at 24. *See also Adams v. Williams*, 407 U.S. 143, 146 (1972). As explained in *Terry*:

> [P]olicemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. . . . [I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he

[9] At trial, Officer Huggins testified: "It appeared to me that he was fixing to bolt on me at any second . . . His actions were looking left, looking right, hand deep in the pocket, so I was closing the gap very quickly."

> considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.

392 U.S. at 32-33 (Harlan, J., concurring); *see also Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979) ("Nothing in Terry can be understood to allow a generalized 'cursory search for weapons.'"). Accordingly, a police officer may not seize an individual without the minimal articulable suspicion of criminal behavior then retroactively use the individual's actions flowing from the seizure to manufacture the suspicion the officer initially lacked. *See, e.g.*, *Terry*, 392 U.S. at 27-28 (examining the conduct of the police officer to determine whether the seizure was reasonable at its "inception and as conducted"). When a seizure is not initially "based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. 47, 52 (1979).

In the instant case, it is clear from the record that when Officer Huggins approached the petitioner and told him to take his hands out of his pockets, he did not have a reasonable suspicion that a crime was being committed and had no reasonable belief that the petitioner was armed and dangerous. Officer Huggins testified that at the time of his approach the petitioner "hadn't done anything wrong."[10] Furthermore, Officer Huggins offered no proof that he observed a weapon or a suspicious bulge or had prior knowledge that the petitioner was violent or carried weapons. Therefore, Officer Huggins not only failed to articulate an objective basis for the initial investigatory stop of the petitioner, but also he failed to articulate any objective factual basis as to why he feared for his safety. This court has previously noted that the mere placement of one's hand in one's pocket is not per se suspicious conduct. *See State v. Antonio D. Jones*, No. M2004-01349-CCA-R3-CD, 2005 WL 1950292, *4 (Tenn. Crim App., at Nashville, Aug.12, 2005) *perm. app. denied* (Tenn. May 1, 2006). Moreover, in the context of a consensual police-citizen encounter, a citizen's "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for detention or seizure." *Bostick*, 501 U.S. at 437. Given that the police did not have a reasonable suspicion sufficient to justify the investigatory detention and the subsequent protective search of the petitioner, we conclude the petitioner was illegally seized in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution. Accordingly, all evidence seized should have been suppressed and it was error for the trial court to deny the

[10] For the sake of thoroughness, we note that Officer Huggins referred to the Petway area as a "high drug area." Nonetheless, while the fact that a temporary detention occurs in a high crime area is a relevant consideration in a *Terry* analysis, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable particularized suspicion that [a] person is committing a crime." *Ilinois v. Wardlow*, 528 U.S. 119, 124 (2000).

petitioner's motion. *See Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963); *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

CONCLUSION

Based on the aforementioned reasons, we conclude that the petitioner was unlawfully seized when officers approached the petitioner for the specific purpose of conducting an investigative detention and ordered him to take his hands out of his pockets. Therefore, the evidence flowing from the unlawful seizure is suppressed and the petitioner's conviction is reversed and vacated.

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J.C. McLIN, JUDGE